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IN THE

Supreme Court of the United States

October Term, 1966

No. 176

UNITED STATES OF AMERICA,
Appellant,

against

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, N. Y. 10017.

Attorneys for Appellees.

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PRESIDENTIAL PROCLAMATIONS, EXECUTIVE ORDERS, DEPARTMENTAL REGULATIONS

PRESIDENTIAL PROCLAMATIONS:

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Opinion Below

The order of Chief Judge Joseph C. Zavatt of the court below dismissing the indictment (R. 5-7) is unreported. The opinion of Judge Zavatt in the related case of *United States* v. *Laub* (R. 8-62) is reported at 253 F. Supp. 433 (E. D. N. Y. 1966).*

Jurisdiction

The District Court's order dismissing the indictment was entered on May 5, 1966 (R. 5-7). A notice of direct appeal to this Court was filed on May 20, 1966 (R. 63), and the Court noted probable jurisdiction on June 13, 1966

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* The undersigned counsel represent all appellees other than appellee Luce.

(R. 64; 384 U. S. 984). The jurisdiction of this Court rests upon 18 U.S.C. §3731 upon the ground that the dismissal of the indictments was "based upon the . . . construction of the statute" upon which the indictments were founded.

Questions Presented

This case presents the following questions:

1. Whether violations of area restrictions upon travel in foreign countries imposed by the Secretary of State are criminally punishable under Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b).

2. Whether Section 215(b), if so construed, is unconstitutional for vagueness and lack of legislative standards.

Statutes, Proclamations, Executive Orders and Regulations Involved

The statutes, proclamations, executive orders and regulations involved are set out in the Appendix, pp. 42-54, *infra*.

Statement

Appellees were charged in a one-count indictment filed in the United States District Court for the Eastern District of New York with conspiring to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), by arranging for the travel to Cuba of American citizens who did not possess passports endorsed for travel to that country (R. 1-2). The Government alleged in a bill of particulars that the individuals whose travel had been solicited possessed "unexpired and unrevoked United States passports which. . . had not been specifically validated by the Secretary of State for travel to Cuba" (R. 4).

The District Court granted appellees' motion to dismiss the indictment (R. 5-7), incorporating its opinion in *United*

States v. *Laub*, 64 Cr. 137 (E.D.N.Y.), a companion case involving two of the appellees and other defendants, who had been similarly indicted, with reference to an earlier trip to Cuba (R. 8-62). In that case, which had been tried before the same district judge without a jury, the Court had acquitted the defendants on the ground that departures from the United States with unexpired and unrevoked passports do not violate Section 215(b) regardless of whether the departing individuals contemplate travel to an area "restricted" by the Secretary of State (R. 45).

The conclusion of the court below that Section 215 is not the source of the power to impose area restrictions is based upon a thorough study both of that statutory provision and the very different matter of area controls. The reasoning of Judge Zavatt may be thus summarized: Section 215 is a border-control statute which requires a valid passport for an American citizen's entry into or departure from the United States, with minor exceptions embodied in regulations relating to the Western Hemisphere generally. A valid passport is one which has not expired nor been revoked, and its endorsement for travel to a particular country is irrelevant to the issue of its validity for departure from and entry into the United States.

The court relied upon the language of Section 215, upon the legislative history of its predecessor statutes, and upon its consistent administrative interpretation and practice. It also relied upon the expert testimony of a State Department official (R. 23). Adopting the strict construction required of a criminal statute affecting a basic liberty (R. 41-42), Judge Zavatt found that the committee reports and debates "were concerned with the uncontrolled departure and entry of citizens of the United States" who might be engaged in illegal activities (R. 41-42), and that in almost thirty years of operation of these border-control laws there had been no previous attempt to apply them to the more than 600 violations of area restrictions (R. 23).

Such area restrictions, said Judge Zavatt, were based exclusively upon a different statute, the Passport Act of 1926, 22 U.S.C. 211a, and upon the predecessor Passport Acts. The court noted the State Department's admissions that no criminal sanctions could be imposed upon violators of area restrictions; and that the Department had unsuccessfully sought of Congress "the very power claimed by the Government in the instant case" (R. 39). Judge Zavatt said, "If, as the court concludes, there is a gap in the law, the right and duty, if any, to fill it devolves upon the legislative, not the executive or judicial branch of the Government" (R. 45).

Summary of Argument

I

This case presents important issues concerning the nature of the constitutional right to travel, the circumstances under which it can be impaired, and the dual functions of the passport, *i. e.*, the national security function of protecting borders of the United States and the political, quasi-diplomatic or foreign affairs function of securing safe conduct for American citizens abroad. The first such function was treated by this Court in *Kent* v. *Dulles,* 357 U. S. 116, the second in *Zemel* v. *Rusk,* 381 U. S. 1.

The Government's brief is permeated by confusion concerning these two functions which is central to its argument. For this reason and in order to avoid undue repetition of the petitioner's brief in *Travis* v. *United States,* No. 963, which we adopt, we propose to treat of the matter conceptually by discussing, first, the foreign affairs function underlying area restrictions and, second, the national security function which is the basis for the departure and entry controls involved in this case.

II

There is a half century history of passport restrictions and endorsements for travel to particular areas. These limitations or reservations have always been regarded as a foreign affairs function; the passport was a "political document", *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699, to ensure the good treatment of citizens abroad. The passport was issued upon a claimed inherent executive power over foreign affairs and since 1856 upon the authority of a passport statute.

The State Department has never claimed that these restrictions upon travel to particular areas had the nation's security as their objective, were predicated upon border-control statutes, or were enforceable by criminal sanctions. Indeed, it publicly asserted the contrary. Hence, in recent years the Department has sought, although unsuccessfully thus far, the statutory authority to impose area restrictions, making violation of such restrictions a criminal offense.

The restrictions upon travel to Cuba are also the exercise of a foreign affairs power. The very language of Public Notice No. 179, 26 Fed. Reg. 492, and the accompanying Press Release No. 24, *infra* pp. 52-53, shows that they claim to be based exclusively upon the Passport Act of 1926 and the implementing Executive Order 7856 of March 31, 1938, 3 Fed. Reg. 799.

III

In contrast, Section 215 of the Immigration and Nationality Act of 1952 is a border-control statute, *affecting both citizens and aliens*, in the interest of national security, and enforced by criminal sanctions.

The construction of this statutory provision was expressly left open in *Zemel* v. *Rusk*, *supra*, where the Court declined to decide whether its criminal sanctions could be used to enforce the Secretary's promulgation of area re-

strictions under a different statute. That issue may now be resolved not only by reference to the statutory language but to its manifest purpose, its legislative history and its administrative implementation.

This statute does not authorize the imposition of foreign area controls, nor has the Government ever claimed that to be the case until it instituted the criminal proceedings in the three Cuba travel cases involved herein. Nor is Section 215 cited in the Public Notice and Press Release as the source of power to impose the restrictions in passports upon travel to Cuba.

The Government admits that its proposed construction is not to be found in the language of Section 215 which is silent on the subject of area restrictions. The statute refers exclusively to departure from and entry into *the United States*. The parallel provisions for aliens make clear the legislative concern for national safety, not for the destination of the traveler.

The extensive legislative history of Section 215 shows that it was a war measure intended to seal the United States borders against espionage by aliens and citizens alike. The Government, while demonstrably wrong in describing this history as "meager", significantly observes that Congress showed no "awareness" of the problem of area restrictions to which the Government would now apply this border-control statute (Br. 20).*

The administrative implementation of Section 215 and its predecessors supports the construction of the court below. No proclamations, executive orders or regulations issued under these entry-departure statutes purported to authorize area restrictions. Although at least 600 persons have traveled to so-called restricted areas, the present group of Cuba travel cases is the first in American history to involve criminal prosecutions.

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* References "(Br.)" are to appellant's brief.

The legislative and the executive branches of the government acquiesced in this interpretation of Section 215 until the very recent criminal proceedings involving travel to Cuba. The Commission on Government Security recommended in 1957 the amendment of Section 215 to make travel to restricted areas a crime. Following *Kent* v. *Dulles,* President Eisenhower urged the passage of a passport act in 1958 to achieve the same objective, and these two proposals have been repeated year after year both in Congress and by the Department of State. Congress has refused to amend the statute.

IV

The Government's construction of Section 215 would make the statute unconstitutionally vague in violation of the Fifth and Sixth Amendments. It would turn a clear national security system of border control into a vague foreign affairs system of determining to what areas Americans may travel. It would require a re-definition of the statutory language. It would make the validity of a passport depend not upon the objective fact of its non-expiration, but upon the intended destination of the traveler.

This construction is contrary to Section 215's plain statutory language, legislative history, and to both administrative practice and implementation. It would import into this criminal statute affecting a fundamental liberty a vagueness which violates the first essentials of due process.

Viewed as delegated authority to determine to which countries American citizens might travel, violation of which is criminally punishable, the statute contains no standards whatsoever to guide the executive. The legislative history and administrative practice contain not the slightest indication of what standards should govern area restrictions. Thus construed, the statute fails to pass the constitutional test enunciated in *Kent* v. *Dulles, supra,* that "the standards must be adequate to pass scrutiny by the accepted tests", 357 U. S. at 129.

ARGUMENT

I

Introduction: The constitutional right to travel and the passport's two functions.

This case presents very important issues concerning the nature of the constitutional right to travel and the circumstances, if any, under which it can be impaired. It also requires a delineation of the dual functions of a passport: first, the political function of seeking safe conduct for an American citizen abroad; and, second, the national security function of controlling departure from and entry into the United States.

In *Kent* v. *Dulles, supra,* this Court dealt with the long-standing practice of the State Department to deny passports to American citizens by reason of membership in the Communist Party and other political associations regarded with disapproval by the Department. The Solicitor General's brief in the *Kent* case (and the dissenting opinion therein) sets forth fully the national security considerations urged by the Government together with an impressive array of precedents for the Department's denial of passports for political reasons.

Nevertheless, this Court concluded that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment", *Kent* v. *Dulles, supra,* at 125. Noting "how deeply engrained in our history this freedom of movement is", *id.* at 126, the Court described its practical and political value, and concluded that it was "basic in our scheme of values", *ibid.*

In the light of this evaluation, the Court held that if the liberty of travel was to be regulated "it must be pursuant to the law-making functions of the Congress", *Kent* v.

Dulles, 357 U. S. at 129, that "if that power is to be delegated, the standards must be adequate by the accepted tests", and that the Court would "construe narrowly all delegated powers that curtail or dilute" the right to travel. It accordingly concluded "that § 1185 [*i.e.*, Section 215] and § 211a do not delegate to the Secretary the kind of authority exercised here", *id.* at 129, stating:

> "We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." *Id.* at 130.

Subsequently, in *Aptheker* v. *The Secretary of State*, 378 U.S. 500, the Court declared unconstitutional § 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785, which, as applied, denied passports to Communist Party members because the Party had been ordered to register under the Act, held constitutional in *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1. The Court reaffirmed what it had said in *Kent* about the constitutional right to travel abroad. It added that "freedom of travel is a constitutional liberty closely related to rights of free speech and association . . .", *id.* at 517. And it declared the statute unconstitutional because it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." *Id.* at 505.

In the third of the major passport cases, *Zemel* v. *Rusk*, 381 U.S. 1, the Court refused to compel the Secretary of State to endorse a passport for travel to Cuba. It upheld the Secretary's refusal upon the basis of the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211a, which provided in pertinent part:

"The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . ."

The Court was of the view that the Secretary of State was entitled under the Passport Act in the interests of foreign affairs of the United States to refuse the requested endorsement; in short, *the Court was there treating with the political function of the passport rather than with the function of exit and entry control.*

The Court declined to consider the Solicitor General's argument, that "travel in violation of an area restriction imposed upon an otherwise valid passport is unlawful under the 1952 Act." *Zemel* v. *Rusk, supra* at 12. It also declined to issue an injunction against the criminal prosecution of Zemel in the event that he should travel, *id.* at 19, and it noted the variety of circumstances under which such travel might occur.

The instant case presents new variants of the constitutional and statutory problems: (i) Did Congress intend in passing Section 215 to prevent and punish travel to particular areas. (ii) If so, is the criminal prohibition constitutional in view of its vagueness, its lack of notice (indeed, its counter-representation to the public) and its total lack of standards.

II

Area restrictions are a political function exercisable under a claim of inherent or statutory foreign relations power.

The history of passport endorsements and restrictions upon travel to particular areas is set forth in considerable detail in this Court's opinion in the *Zemel* case, and need

not be repeated here. The significance of the history is that (i) the exercise of this power was regarded as a foreign relations (not a national security) function; (ii) the passport was treated as a political or quasi-diplomatic document rather than a security control over entry and departure; (iii) the Secretary's actions were bottomed upon either an inherent executive power or, more recently, a passport act; and (iv) criminal sanctions were never regarded as enforcing such "restrictions."

A. Past Restrictions Have Always Been Based Upon Foreign Policy.

The area restrictions promulgated by the Secretary over the years have been based upon a variety of foreign policy considerations arising from non-recognition of foreign governments or from the inability to protect American citizens in troubled foreign areas.

This is true of the first cited restrictions imposed because of a famine in Belgium in 1915, *Zemel v. Rusk, supra,* at 8. It is reflected in our policy during the Ethiopian War of 1935 and the Spanish Civil War of 1936-7.[1] Most of the post-World War II instances reflected our disagreement with the policies of the Soviet Union and associated countries. In some cases, American citizens had been mistreated abroad and the United States Government either wished to show its disapproval of such treatment or to emphasize that it was unable to give diplomatic protection.

This reliance upon the exclusively foreign relations basis is a fundamental principle of the State Department. Thus, in recent congressional committee hearings, the Acting Administrator of the Bureau of Security and Consular Affairs said that "our restrictions have always been

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[1] See the Court's opinion in *Zemel* v. *Rusk, supra,* written by the Chief Justice, and Mr. Justice Goldberg's dissenting opinion at p. 27, which contain a full history of the restrictions.

imposed on a foreign affairs basis, our area restrictions", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, etc.*, of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. on S. 3243 (May, 1966) p. 61.[2]

The political aspect of area restrictions is emphasized by the Department's statement that "all [the area restrictions] but Cuba are handled by press statements", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, supra* at 59. Obviously, if such restrictions were based upon national security statutes with criminal sanctions, more formal and precise notice to the public would have been required and employed. And when the Department seeks statutory authority for area restrictions, its proposed bill is a United States Passport Act "to promote the foreign policy of the United States", H.R. 14895, 89th Cong., 2d Sess., and a substitute for the present Passport Act. In contrast, Senator Eastland's proposed bill S. 3243, 89th Cong., 2d Sess., would amend, over departmental objections, Section 215 by turning it into an area restriction statute thereby accomplishing —for the future—the purposes of the Government in the instant litigation.

What is significant here is not only the joint recognition of the need to amend the law (see *infra* at 34) but its consistency with the Department's view that area restrictions are matters of foreign policy, and that departure and entry border controls are matters of internal security. As the Acting Administrator of the Bureau of Security and Consular Affairs so succinctly put it: "I never had

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[2] This statement by Mr. Philip B. Heymann, an administrator and scholar of recognized ability was not inadvertent; it was constantly repeated during the hearings. See, *e.g.*, his statement that "our concept of travel controls is restricted to foreign affairs" *id.* at 61, and his claim that the travel to Albania "appears to concern the conduct of foreign relations and nothing else", *id.* at 61.

any doubt that *Zemel* v. *Rusk* would be looked at as a foreign policy case, and I actually think that is what happened", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, supra* at 57.

The remarks of the Acting Administrator just quoted above together with the examples of geographic limitations recited in the several opinions of *Zemel* v. *Rusk, supra,* show positively that the restrictions had nothing whatsoever to do with national security and the related system of border control. This is also manifest from the fact that many of the "restrictions" occurred prior to August 8, 1918 and during the period from March 3, 1921 to November, 1941 when no border control statute was in effect.[8] *Zemel* v. *Rusk, supra,* at 8-10.

The foreign relations power was always the source of authority for these area restrictions. When in 1938 the President authorized the Secretary in his discretion "to restrict the passport for use only in certain countries . . .", Exec. Order 7856, 3 F.R. 799, the claimed authority for that order was a passport statute, the Passport Act of 1926, *supra,* see 22 C.F.R. § 51.75 (1958).

B. The Restrictions on Cuban Travel Arise From the Breach in Diplomatic Relations.

Hence, when the Secretary came to issue Public Notice 179, 26 F.R. 492, *infra* at 51, on January 16, 1961, that notice asserted as authority only Executive Order 7856 and

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[8] See Act of May 22, 1918, 40 Stat. 559, effective on August 8, 1918 by Proclamation No. 1473, 40 Stat. 1829, et seq., and Exec. Order No. 2932, containing implementing regulations, 1918 For. Rel. Supp. 2, 815. It was in effect until March 3, 1921 when H. Res. 64, 41 Stat. 1359, et seq., terminated the existing state of war for the purpose of such wartime legislation. See Act of May 27, 1941, 55 Stat. 1647, invoked by Proclamation No. 2523, 55 Stat. 1696, November 14, 1941, and implemented by the Secretary's Regulations, published on November 28, 1941, 6 F. R. 6069.

the Passport Act of 1926 and the restrictions were based upon "conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America."

The Secretary's press release of the same day indicated the quasi-diplomatic or foreign policy considerations by announcing that passports must be specifically endorsed because of the United States Government's "inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba," *infra* at 52. The press release added that "[t]hese actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations", *infra* at 53.

In *Zemel* v. *Rusk*, this Court held that these area restrictions had been asserted by the Executive under Passport Acts prior to that of 1926, and that this practice "supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions", *Zemel* v. *Rusk*, *supra* at 9. The Court also noted the "post-1926 history of Executive imposition of area restrictions", *id.* at 11, and that "[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions", Congress in enacting the Act of 1952 "left completely untouched the broad rule-making authority granted in the earlier Act", *id.* at 12.

C. The State Department Has Always Agreed That Area Restrictions Are Not Criminally Enforceable Prohibitions Upon Travel.

Long prior to the present litigation, the Department announced to the public that the restrictions made under its foreign relations power were not prohibitions upon travel or, more to the point, prohibitions whose violation would have criminal consequences. Its press release of May 1, 1952 stated:

> "This passport is not valid for travel to [specified countries] unless specifically endorsed under authority of the Department of State as being valid for such travel." [5]

At the same time, the Department stated that it was *not* a travel prohibition:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of travelling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized." *Ibid.*

The Association of the Bar of the City of New York in discussing this press release states:

> "This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Freedom to Travel—Report of the Special Committee to Study Passport Procedures*, 70 (1958)

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." *Ibid.*

This press release was the subject of repeated inquiries before congressional committees. On April 2, 1957, Senator Fulbright examined Deputy Under-Secretary of State

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[5] Press Release No. 341 quoted in *Hearing before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. (1957), p. 17; *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957) 40.

Murphy and his associates on the subject before the Senate Foreign Relations Committee. The Department's responses then and later were correctly regarded by the committee as non-responsive; they were certainly extremely vague,[6] *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), pp. 14-15, 40-41, 54, 78.

The Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary was also interested in the implications of this press release. On July 4, 1957, Senator Joseph O'Mahoney called it to the attention of the senior departmental officials. They were able to cite no statute making it a crime to travel to a "proscribed" country, *Hearings before the Sub-Committee on Constitutional Rights of the Senate on the Judiciary*, 85th Cong., 1st Sess. (1957), pp. 17, 93-95.

The Foreign Relations Committee had also inquired as to the reasons for passport restrictions, the significance of the term "valid" and the existence *vel non* of criminal sanctions. The Department replied that a restrictive passport meant that "if the bearer enters country X he cannot be assured of the protection of the United States . . . it means that the United States does not approve of the bearer's going to country X. The restriction on the passport does not necessarily mean that if the bearer travels to country X he will be violating the criminal law", *Hearings before the Senate Foreign Relations Committee* (1957), *supra* at 59.

The Department's determination of the countries for which it approved such travel was admittedly a policy

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[6] The Department's efforts to reinterpret this release have not been very persuasive. See also *Hearings before the Senate Committee on Foreign Relations on Passport Legislation*, S. 2770, S. 3998, S. 4110 and S. 4137, 85th Cong., 2d Sess. (1958), p. 27. Elsewhere its representatives have expressed some doubt as to whether a violation of the regulations is a violation of the Passport Laws. See *e.g., Senate For. Rel. Hearings 1957, supra* at 31, 59.

decision based upon such matters as diplomatic relations and the safety of the citizen, *Hearings before the Sub-Committee on Constitutional Rights* (1957), *supra* at 25-26. As an official testified, the significance of the phrase "not valid" means "this this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government." *Id.* at 86; see also *id.* at 62.

Specific inquiry was made by the Committee on Foreign Relations concerning the travel of William Worthy to China. Significantly, the only section referred to by the Department was 18 U. S. C. § 1544 which relates to the misuse of a passport. *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957) p. 24. Similarly, see the *Judiciary Committee Hearing, supra,* at 91.

III

Section 215 is a border-control statute and does not authorize area restrictions.

A. Introduction

This statute in its language, purpose, legislative history and implementation has nothing whatever to do with area restrictions. It is a border-control statute.

The statute is not cited as authority for the area restrictions imposed by Public Notice 179, 26 F.R. 492 (App., *infra* at 51) or by Departmental Regulation 108.456, 26 F.R. 482 (Jan. 19, 1961), amending 22 C.F.R. 53.3(b) (1957) (App., *infra* at 50). Indeed, in *Zemel* v. *Rusk,* 228 F. Supp. 65 (D. Conn. 1964), District Judge Blumenfeld viewed the area restrictions under attack as "promulgated under § 211(a)" (*id.* at 79) and stated that "the secretary expressly disclaims reliance upon [8 U.S.C. 1185]" here as

a source of authority for the regulation excluding travel to Cuba, *id.* at 81.

In *Zemel* v. *Rusk*, *supra*, no Justice of this Court adopted the Government's argument that "Section 215 of the Immigration and Nationality Act confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof", *Zemel* v. *Rusk*, No. 86, Oct. Term, 1964, Brief for the Appellees, p. 56. Instead, the Court expressly reserved the question and relied exclusively upon the Passport Act, *Zemel* v. *Rusk*, *supra* at 12.

The Government agrees in this case that "Section 215(b) does not in so many words prohibit violations of area restrictions" (Br. 11). It agrees that no legislative history supports its position; it does not respond to that recited by the Court below (R. 42-45); it describes the congressional committee reports as "meager" (Br. 20), and says that the debates did not "show any awareness of this problem" (Br. 20). It relies not upon what Congress did, but what Congress must have "intended" (Br. 23) or "meant" (Br. 23), and upon the "premises from which Congress must have proceeded" (Br. 25). As will be seen below, the Government has adopted a novel approach for the construction of a criminal statute which, in addition, affects the exercise of fundamental liberties.

B. The Plain Meaning of the Statutory Language

This case is governed by Mr. Justice Reed's statement that:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the

legislation. In such cases we have followed their plain meaning." *United States* v. *American Trucking Association*, 310 U.S. 534, 543.

The language of Section 215 is not ambiguous. A valid passport is a passport in usual form which has neither been revoked nor lapsed by passage of time. The terms "entry and departure" refer explicitly to crossing the borders of the United States in either direction, not to crossing the borders of a foreign country. The term is used in the same sense as Congress used it in the Narcotic Control Act of 1956, 18 U.S.C. 1407, 70 Stat. 574. See *United States* v. *Eramdjian*, 155 F. Supp. 914 (S.D. Cal. 1957), *aff'd sub nom., Reyes* v. *United States*, 258 F. 2d 774 (9th Cir. 1958).

The Court has held in *Zemel* that the language of the Passport Act providing that the Secretary "may grant and issue passports" was "broad enough to authorize area restrictions," *Zemel* v. *United States, supra* at 8. Clearly, that cannot be said of a statute which is silent on the subject of passport issuance. Indeed, it has always been assumed that Section 215 refers to entry and departure from the United States. See, *e.g.*, 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed., 1945) at 1202, 1205.[7] As the District Court noted below (R. 44-45), when Congress intended to prohibit travel in particular areas or on particular means of transportation, it was capable of using unmistakable language for such purposes. The Act of February 4, 1815, 3 Stat. 199, directed that no citizen or resident "be permitted to cross the frontier into the enemy's country or territory in its possession without a passport." The Act of June 30, 1834, 4 Stat. 729, is another example of an explicit area limitation. And the Neutrality Act of

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[7] See also the Department's description of the Secretary's authority in emergency situations "as the method of controlling the departure from and re-entry into the United States by American citizens." *Senate For. Rel. Hearings 1958, supra* at 25.

1939, 22 U.S.C. §441(3a), (5a), made it unlawful to travel "into or through any such combat area" or "on any vessel of any state named in such proclamation."

The meaning and purpose of the statute is demonstrated further by the fact that Section 215(a)(1) makes it unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States", subject to presidential rules, limitations and exceptions. Similar provisions were in the preceding Acts of 1918 and 1941. The present statute was implemented as to aliens by the same Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, which relates to citizens, and by departmental regulations now codified at 22 C.F.R. 46.1-46.7.

It is apparent from the controls over alien departure that Section 215 has never been regarded as carrying out a foreign affairs function of the kind which underlies passport restrictions under 22 U. S. C. 211(a); the United States Government is not concerned with the protection of aliens abroad. The departmental regulations in 22 C.F.R. Part 46 are keyed exclusively to matters relating to national defense.

The Government seizes upon the single word, "valid", in the statute in an effort to turn the statute into one which authorizes the imposition of area restrictions. It says that the statutory requirement that a citizen must bear a "valid" passport in order to depart from or enter the United States means a passport validated for a particular foreign country, and that this makes it an area restriction statute.

The decisive objection to this tortuous argument is that it is not germane to the purpose and legislative history of the statute which was to seal American borders against espionage and related activities. Of course, it is the Government, not the statute, which uses such terms as "validity", "restricted" and "endorsed". There is nothing in the general definition of a passport set forth in

8 U. S. C. 1101(a)(30), upon which the Government relies, which negates our construction. Contrary to the Government's suggestion, Section 1101(a)(30) does not condition the validity of a passport upon its utility for entry into *every* foreign country. The term "valid passport" is satisfied by a standard passport which is issued to virtually all citizens who request them. Any ambiguity about the term should be resolved in favor of the appellees herein since it is a criminal statute affecting personal liberty, *Kent* v. *Dulles, supra.*

In *Zemel,* the Chief Justice in his opinion for the Court, discussed the variety of situations in which travel to a restricted area might occur, *Zemel* v. *Rusk, supra* at 19. That very complexity shows the necessity for a construction of the statute protective of the liberty of the citizen.

Finally, it should not be overlooked that whatever reference is made in statute or regulation to the matter of validity relates exclusively to the question of the duration of the passport. This may be seen in 22 U. S. C. § 217a. See also Executive Order 7856 where the term "restricting its validity" clearly refers to duration, 22 C.F.R. 51.115-117, 51.119, 55.121, 55.124. The Department's own handbook defines the term "valid passport" as "a passport, the validity of which has not expired", Department of State, Passport Office, *Clerk of Court Handbook of Passports* (Aug. 1, 1958), Chapter 300, § 311, p. 10.

C. The Legislative History and Purpose

The legislative history of Section 215 and of its predecessor statutes, the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252, shows that Section 215 was a war measure intended to seal off the borders of the United States by requiring passports of American citizens for entry into and departure from the United States, and by requiring permission for aliens similarly desiring to cross American borders.

The Government makes no claim that the legislative history supports its position; it prefers to describe that history as being "consistent" with its position (Br. 20). But even this modest assertion is incorrect and no reader of the House and Senate reports on the bill which became the 1918 Act could describe those comprehensive and informative reports as "meager".

The Government is correct in stating that "[n]or do the debates on the floor of either chamber show any awareness of this problem [area restrictions] by the sponsors of the legislation or those who questioned them" (Br. 20). The explanation is simple and dispositive; the bill did not deal with area restrictions.

The Government's argument constitutes a pyramid of conjecture unsupported by any judicial decisions or cases governing the construction of criminal statutes. It says that the Congress in 1918 must have known what the Department representatives testified in 1957, namely, that "passports were made valid for specific countries and for specific purposes" during World War I (Br. 21-22). This is, of course, completely irrelevant since the "wartime passport policy" (Br. 21) was a policy of departmental passport restrictions unsupported by sanctions. The Government's argument proves too much; if the practice of making passports "valid for specific countries and for specific purposes" is relevant, then a passport would be valid only if used for the travel purpose specifically set forth in the application—a manifestly absurd result.

The Government's basic argument, equally conjectural, is that it is "unlikely that Congress intended to leave the large gap in the enforcement of area restrictions" (Br. 11; see also 21-23). But Congress was not interested in that subject in 1918, 1941 or 1952. Indeed, it shows a singular disinterest in area restrictions even today.

(1) The original border control statute, the Act of May 22, 1918

The Act of 1918 was a war measure directed at such crimes as espionage by restricting the entry into and departure from the United States of both aliens and citizens.[8] The House Foreign Affairs Committee which added the section relating to the travel of citizens [9] explained the bill as follows (H. Rep. 485, 65th Cong., 2d Sess., pp. 2-3):

> "The bill is intended to stop an important gap in the war legislation of the United States. * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive department have power to curb the general departure and entry of travelers.
>
> New legislation is the only remedy. * * *
>
> * * * It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American

[8] It was suggested by President Woodrow Wilson in his Address to Congress on December 4, 1917, where he emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." As the Committee on Foreign Affairs of the House of Representatives pointed out: "The Attorney General in his report for 1917 made a similar recommendation. The Department of Justice proceeded to draft the bill now under discussion, which was referred to and received the approval of all the other executive departments interested in the matters to which it relates. It was introduced in Congress on February 26, 1918." H. Rep. 485, 65th Cong., 2d Sess., p. 2.

[9] See 56 Cong. Rec. 6029.

citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined."

The bill was limited to war and required a Presidential finding concerning "the public safety" to justify the prohibition of entry into and departure from the United States without permission (56 Cong. Rec. 6029).[10]

Mr. Flood, its principal spokesman, emphasized the fact that it was a war measure intended "to control ingress and egress from this country" (56 Cong. Rec. 6029). A principal purpose, in his view was to prevent "traitors [from getting] the chance to come back and spy on our military operations" (56 Cong. Rec. 6064). The record is replete with references to "suspects", "traitors" and "suspected spies" (56 Cong. Rec. 6031, 6064, 6067). When it was suggested that they could be criminally prosecuted if permitted to enter, he responded that because there were difficulties of proof "these are people who ought to be now out of the country and kept out until the war ends" (56 Cong. Rec. 6066). Mr. Flood added that all nations at war "have found it

[10] "Mr. Moore of Pennsylvania: The gentleman advances this as a war measure and puts it on that ground?

Mr. Flood: Absolutely. It is limited to the duration of the war." (56 Cong. Rec. 6030)

necessary to control travel to and from their countries" and that "Germany has . . . closed its borders entirely" (56 Cong. Rec. 6067).[11]

In the Senate, its Judiciary Committee also pointed out that the "danger of transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers" (S. Rep. No. 431, 65th Cong., 2d Sess., p. 2).[12] Mr. Shields, spokesman for the bill, described it as a "supplement to the espionage acts" (56 Cong. Rec. 6191) and said: "The object of it is to control the entry and departure of all persons in or from their territory. It is a war measure and in line with the legislation that has been enacted by all the nations engaged in the war" (56 Cong. Rec. 6191). The debate in the Senate emphasized that the bill "authorizes prevention of departure and entry" and that it was a "war measure" (see 56 Cong. Rec. 6191, 6192, 6194, 6248).

The resulting statute was entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety", 22 U. S. C. 223, 40 Stat. 559.

The act was approved on May 22, 1918. The executive implementation of the act shows no imposition of area

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[11] There were numerous references to border control and no reference whatever to the imposition of area restrictions. It was understood that passports would not be required for the crossing of the Canadian-American border because of the inconvenience of a passport system to American citizens working in Canada. See, *e.g.*, 56 Cong. Rec. 6192.

[12] The Committee said with respect to a particular citizen that "not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so." *Id.*, p. 3.

restrictions.[13] While the controls as to aliens were continued (40 Stat. 559), since the statute was effective only in wartime, the controls automatically terminated as to citizens on March 3, 1921 at the end of the war (H. Res. No. 64, 41 Stat. 1359, *et seq.*).[14]

(2) The Amendment of June 21, 1941

In 1941, after President Franklin D. Roosevelt had proclaimed an unlimited national emergency,[15] Congress amended the 1918 statute to provide, *inter alia*, that the act could be invoked during the then existing emergency.[16] The legislative history of that statute shows that its purpose was the same as that of its predecessor (S. Rep. 444, 77th Cong., 2d Sess., pp. 1-2). The pertinent Senate Report pointed out the necessity for controlling "the entry into and departure from the United States of persons of all classes" in order to avoid espionage and subversive activities in the United States (S. Rep. 444, 77th Cong., 2d Sess., p. 2).

Again the debates were unequivocal concerning the purpose of the bill and the intended manner of its operation. In the House, Congressman Bloom made reference to

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[13] See Executive Order No. 2932, For. Rel., 1918, 810, 815, for the implementing regulations. The history of those regulations and their operation during World War I, is set forth in 2 Hyde, *International Law Chiefly as Interpreted and Applied By the United States* (1945), pp. 1202-1206. See also *Hearings on The Extension of Passport Control. Hearings before the Committee on Foreign Affairs of the House of Representatives,* 69th Cong., 1st Sess. (1919).

[14] See also Executive Order of June 27, 1920 amending the Order of August 9, 1918 by permitting the departure without a United States permit of hostile or enemy aliens. Hyde, *op. cit. supra* at 1206-07.

[15] Proclamation No. 2487, May 27, 1941, 55 Stat. 1647.

[16] Act of June 21, 1941, 55 Stat. 252.

"a law that prevents aliens and citizens from departing or entering this country during the time this country is at war" (87 Cong. Rec. 5048). Mr. Dickstein said that "this bill distinctly speaks of a person entering and going." *Ibid.*

The debate in the Senate was along the same lines (87 Cong. Rec. 5325-5326, 5387-5389).[17] The significant new element in the Senate debate was Senator Taft's insistence "that the bill should be confined to the present emergency" (87 Cong. Rec. 5386) because it affected a basic liberty. He said that "when in effect we delegate legislative powers to the President, such powers should be confined to the particular emergency for which we are asked to delegate them; and when the emergency is over they should terminate." *Ibid.* Senator La Follette supported Senator Taft's amendment (87 Cong. Rec. 5387) and the bill was eventually limited, so far as citizens are concerned, to "the existence of the national emergency proclaimed by the President on May 27, 1941"; it was agreed to in that form by the House (87 Cong. Rec. 5416). The Taft Amendment is relevant to any consideration of the wartime purpose of this series of statutes. It also has a bearing upon the constitutional problem, *infra* at 36.

The 1941 statute was invoked by the President less than a month before Pearl Harbor.[18] It was implemented by regulations of the Secretary of State requiring passports for entry and departure and not imposing area restric-

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[17] Senator Van Nuys, the principal proponent of the bill, pointed out that "the main objective is to reach certain elements of aliens" (87 Cong. Rec. 5325). He stated that "there is more espionage and subversive activities in the United States today than at any previous time in our history" (87 Cong. Rec. 5386). Senator Taft referred to "travel over the borders of the United States." (*Ibid.*)

[18] Proclamation No. 2523, November 14, 1941, 55 Stat. 1696.

tions.[19] Congress continued the statutory provisions in effect until April 1, 1953.[20]

(3) The present statute

In 1952 Congress repealed the 1918 statute, as amended by the Act of June 21, 1941, 55 Stat. 252, enacting the new law making the provisions subject to invocation during "any national emergency proclaimed by the President . . .", (66 Stat. 190). It is obvious that the basic purpose of the 1952 statute is the same as that of its two predecessors in view of the absence of additional legislative history and the statement in the House Report that the statutory provisions "are incorporated in the bill [Sec. 215] in practically the same form as they now appear in the Act of May 22, 1918 (40 Stat. 559)", H. Rep. 1365, 82d Cong., 2d Sess., p. 53. See also *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541. In other words, the statute is a wartime measure imposing controls over the departure and entry of aliens and citizens because of the danger of their committing criminal acts affecting the national defense.[21]

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[19] Departmental Order 1003, 6 F.R. 6069. These regulations were amended by Departmental Regulations 11, August 27, 1945, 10 F.R. 11046, and now appear in 22 C.F.R. Part 53.

[20] 66 Stat. 54, 57, 96, 137, 330, 333.

[21] As the Solicitor General correctly points out in his brief in *Kent* v. *Dulles*, *supra* at 55-56:

> "In short, the intended control of departure and entry * was to be carried out by the denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed 'contrary to the public safety' in the context of the war or emergency which required the invocation of the restrictions."
>
> * The 1918 statute (40 Stat. 559) was entitled 'An Act to prevent in time of war departure from or entry into the United States contrary to the public safety'" [asterisk supplied in place of number].

The administrative implementation of this statute of 1952 likewise supports the narrow construction required by the Court in the *Kent* case for constitutional reasons. On January 17, 1953, the President promulgated Proclamation 3004, 67 Stat. C31, significantly entitled, "Control of Persons Leaving or Entering the United States by the President of the United States of America", *infra* at 46. The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued "in the interests of the United States", *ibid.* The regulations of the Secretary relating to departure and entry which had been issued in 1941 were expressly incorporated, as amended, in the Proclamation, *infra* at 48. Neither the Proclamation nor the regulations do more than require passports for departure from or entry into the United States.

D. The Test of Administrative Implementation.

In *Zemel* v. *Rusk, supra* at 11, the Court stated that "[t]he interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute. *Udall* v. *Tallman*, 380 U. S. 1, 16-18; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315."

Applying these tests, the Court held in *Zemel* that there was a history of passport area restrictions and that those restrictions were imposed pursuant to the Passport Act of 1926. Applying the identical test here, it is obvious that the Immigration Act is supported by no such administrative interpretation and implementation.

We have already shown that the Presidential proclamations and executive orders under the border-control acts were limited to the matter of entry and departure and did not purport to authorize area restrictions pursuant to the Immigration Act and its predecessors.

The one reference to area restrictions makes it doubly clear that the source of area control was not a border control statute. Thus, Presidential Proclamation No. 3004, 67 Stat. C31, which was issued in 1953 pursuant to Section 215(b), specifically stated that the departure of citizens would be governed by 22 C.F.R. 53.1 to 53.9. Section 53.8 of 22 C.F.R. provided in pertinent part [22 C.F.R. (1949 ed.) 53.8]:

> "§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

In short, the Proclamation noted the Secretary's powers under 22 C.F.R. 53.8 (*which were derived from the Passport Act*) and stated that the proclamation was not intended to *deprive* the Secretary of the powers he possessed under that statute. What Proclamation 3004 does *not* do, is to *give* the Secretary the power to prohibit travel to particular areas pursuant to the proclamation or to the border-control statutes. The Government's attempt to read this reservation of the Secretary's diplomatic function as an affirmative assertion of a national security criminal power is, of course, illogical.

The Secretary, in exercising his power to restrict passports, has never once relied upon a border-control statute. Not a single one of the restrictions upon travel involves such reliance, *supra* at 23-29. Indeed, the prohibition of travel to Cuba is explicitly based upon the Passport Act. As the Department's spokesman, Philip B. Heymann, Acting Administrator of the Bureau of Security and Consular Affairs, authoritatively stated recently, "In area restric-

tions we look only at foreign affairs and that is all we need them for, and that is all we use them for.[22]

The most obvious form of statutory implementation would have been to prosecute criminally the individuals who traveled to areas forbidden by the Secretary. The fact of such unauthorized travel on a large-scale basis to other countries is not a secret. It has been discussed by the State Department before a congressional committee;[23] it has been the subject of a report by the Commission on Government Security[24] and by congressional committees. In *United States* v. *Laub*, 253 F. Supp. 433, the court found that at least 600 persons engaged in such unauthorized travel since 1952.[25]

Yet, the defendants in the three recent Cuba travel cases are the first in this long period of widespread disregard of passport restrictions to be criminally prosecuted for such travel under the border-control statute. Even William Worthy was prosecuted only for his entry into the United States under Section 215, the entry provision of which was declared unconstitutional, *Worthy* v. *United States*, 328 F. 2d 386 (5th Cir. 1964).

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[22] *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, Committee on the Judiciary, United States Senate on S. 3243, 89th Cong., 2d Sess., p. 61; see also p. 23.

[23] See, *e.g.*, *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957). pp. 23-24, 26, 30-31, 55, 71; *Hearings before the Senate Committee on Foreign Relations on Passport Legislation*, S. 2770, S. 3998, S. 4110, and S. 4137, 85th Cong., 2d Sess. (1958), pp. 38, 163, 196.

[24] *Report of the Commission on Government Security* published pursuant to Public Law 304, 84th Cong. (1957), p. 472.

[25] The Department reaffirmed this fact before the Internal Security Subcommittee, *supra* n. 22, p. 43, and submitted a schedule to that committee of the names of 282 people who traveled despite the so-called "restrictions" since January 1, 1963, *id.* at 62-66.

E. The Statute Must Be Literally and Narrowly Construed

The Government concedes that "Section 215(b) does not in so many many words prohibit violations of area restrictions" (Br. 11). It repeats that "Section 215(b) was not as explicit in prohibiting violations of area restrictions as it might be" (Br. 27). Given this admission, it is clear that the construction of the statute as being "broad enough to encompass departures for geographically restricted areas" (Br. 11) violates the rule that statutes must be narrowly construed where they are penal or where they might curtail a fundamental human liberty, *Kent* v. *Dulles, supra* at 129.

There is nothing ambiguous about this statute. Its use of the words "depart from and enter" necessarily refers to crossing the borders of the United States. But the proposed expansion to take into consideration what Congress "undoubtedly knew" (Br. 23), and what it "must have intended" (*ibid.*), violates, first, the canon of construction which places primary reliance upon the language employed by legislators, *United States* v. *American Trucking Association, supra;* second, the rule of narrow construction required of a criminal statute, *Commissioner* v. *Acker,* 361 U. S. 87, 91; *Smith* v. *United States,* 360 U. S. 1, 9; *F.C.C.* v. *American Broadcasting Co.,* 347 U. S. 284, 296, and, third, the pronouncement in *Kent* that "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles, supra* at 129.

Finally, the Government's construction would lead to the most absurd results which in addition would not advance the claimed objective of area restrictions. First, Section 215 is obviously inapplicable to an American citizen residing in France who decides to go to Cuba since he would not be leaving the United States at all. Second, the citizen who intends upon his departure from the United

States to go to Cuba but changes his mind en route would be guilty of a violation of Section 215 since the crime is committed at the time of departure. These absurd results arise only if one adopts the Government's view that a statute making no mention of foreign destinations was intended to deal with that subject.

F. The Government Has Always Agreed With This Position Until it Embarked Upon the Current Criminal Prosecutions

The Government has never hitherto suggested that area restrictions are based upon Section 215 or its predecessor statutes, or that disregard of departmental strictures involves criminal sanctions under Section 215. The only statutes ever mentioned were two others dealing with ancillary matters, *i.e.*, the physical use of a passport, 18 U. S. C. § 1544,[26] and the use of foreign exchange in a restricted area, Trading with the Enemy Act, 50 App. U. S. C. § 1, et seq.[27] There is no occasion to determine here the applicability or validity of those two statutes.

In discussing the right to restrict passports against use in certain parts of the world the Solicitor General in *Kent* v. *Dulles, supra*, correctly pointed out: "But this restriction would carry no sanctions, since the statute now makes it unlawful only 'to depart from or enter' the country *without a lawful passport.*" [28]

The most authoritative study of the subject concluded:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omis-

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[26] *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies* (1957), *supra* n. 23 at p. 24.

[27] *Id.* at 55.

[28] Brief for respondent, *Kent and Briehl* v. *Dulles*, Oct. Term, 1957, No. 481, p. 56, n. 57 (italics the Government's).

sion if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." Association of the Bar of the City of New York Report, *Freedom to Travel*, p. 70.[29]

G. Recognition of the Need for Legislation to Give the Desired Power

The lack of power has been repeatedly demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel. In 1957, the *Report of the Commission on Government Security* expressly recommended the amendment of 8 U.S.C. 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid", S. Doc. 64, 84th Cong. (1957), 475.

Then, following the *Kent* decision, the President asked Congress for "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives . . .", H. Doc. No. 417, 85th Cong., 2d Sess. This was not a routine request. It was made formally and explicitly because of the Court's decision in the *Kent* case. The President's request was embodied in a bill which was followed by numerous similar bills in the last six years.[30]

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[29] One of the authors of this study was the Hon. Adrian S. Fisher, former Legal Adviser to the Department of State.

[30] See, *e.g.*, 85th Cong., 1st Sess.: S. 2770, H.R. 8655; 85th Cong., 2d Sess.: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87th Cong., 1st Sess.: H.R. 388, 935, 1086, 2485; 88th Cong., 1st Sess.: H.R. 2559, 8652.

The most recent departmental bill, H.R. 14895, 89th Cong., 2d Sess., "was prepared by the Department of State which had been studying it for 2 years", *Subcommittee Hearings on Internal Security Act, supra* at 50. This bill explicitly authorizes the Secretary to impose area restrictions and makes them criminally punishable. As Mr. Heymann has stated:

> "* * * What it does in the areas of territorial restrictions, in the areas of denial or revocation of a passport, is that it describes rather tightly, and limits very tightly, our power to control the travel of American citizens. It then makes enforceable the very tightly limited power that the Secretary is given." *Id.* at 73.

Senator Eastland introduced his own bill, S. 3243, 89th Cong., 2d Sess., which would amend Section 215 by adding a new section authorizing the Secretary of State, with the approval of the President, to impose area restrictions, the violation of which would be criminally punishable.[31]

As Mr. Justice Frankfurter has said, "* * * [t]his practical construction of the Act by those entrusted with its administration is reenforced by the [Administration's] unsuccessful attempt to secure from Congress an express grant of authority . . .", *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352.

H. The Government's Present Explanation

Having previously been required to admit that the language of the statute does not support it and that the legislative history is likewise unsatisfactory, *supra* at 18, the Government then turns to denigration of the State Department officials' interpretation and administration of the

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[31] The Senator stated, "I became convinced that travel controls which the State Department has sought to impose to effectuate could not be enforced in the courts without a grant of legislative authority." *Id.* at 7.

Department's passport policy. It admits that the Department "has not called this application of Section 215(b) to public attention as much as it might have and State Department representatives have occasionally suggested that no criminal sanctions lie behind the Secretary's area restrictions" (Br. 8). It describes the Department's 1952 Press Release as "somewhat ambiguous", and it attacks the statements of departmental officials in congressional committee hearings as "plainly unsound" (Br. 30). It offers no explanation for the failure to prosecute the known 600 people who traveled to restricted areas and the probable hundreds of others who also engaged in such travel.

It is sufficient to note here that the departmental officials who testified in the numerous congressional committee hearings on this subject were either such important officials as Under-Secretary of State Murphy or others who, however, had the responsibility for carrying out the Department's policies. This is very different from the mere "affirmative disclaimers of agency power" (Br. 28) for which the Government cites *Federal Trade Commission* v. *Dean Foods Co.*, 384 U. S. 597. All that the Court did in *Dean* was to refuse to infer from the failure of Congress to act upon a commission's request for legislation "that Congress thereby expressed an intent to circumscribe traditional judicial remedies", *id.* at 610.

IV

The Government's construction of Section 215 would make it unconstitutional for vagueness and lack of legislative standards.

A. *Vagueness.* There is nothing vague about the language of Section 215, if given normal meaning. It requires a passport for departure from or entry into the United States and the passport must be a valid one, *i.e.*, one which by its terms has not expired, *supra* at 21. But

if one is to construe the statute as the Government does, *i.e.*, one which (i) imposes area restrictions, (ii) substitutes the term "validated" passport for "valid", and (iii) makes validity depend not upon the nature of the passport but the intended destination, then it is clearly unconstitutional for vagueness.

The use of terms so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law", *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; see also *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 238-240. The testimony of the departmental officials before the congressional committees, *supra* at 18, reveals their ignorance of the construction now sought to be imposed on the statute. If those experts did not know, how can this knowledge be ascribed to the average citizen? As Mr. Justice Holmes said, in declining to construe a criminal statute in a manner etymologically possible:

> "* * * it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U. S. 25, 27.

Restrictions upon travel involve the exercise of rights "necessary to the well-being of an American citizen", *Kent* v. *Dulles*, *supra* at 129, with "large social values", *id.* at 126, and "peripheral to the enjoyment of First Amendment guarantees", Mr. Justice Douglas, dissenting in *Zemel* v. *Rusk*, *supra* at 24. In such cases vagueness is especially pernicious, *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290.

The Department has commendably admitted that Section 215, as construed by it, is "inadequate" because "it does not make clear that it is a crime to go into a restricted area".[32] It is precisely for that reason that the Department's representative referred to "the view long held by the executive and legislative branches that the existing enforcement provisions are not satisfactory."[33] The Department's conclusion was:

> "* * * we agree with the need to provide clear statutory authority for the imposition of necessary area restrictions and appropriate enforcement provisions."[34]

As was so well put by the Acting Administrator of the Bureau of Security and Consular Affairs:

> "In other words, right now we have broadly worded authority to do whatever we want, and very sloppy statutory powers to enforce what we do."[35]

This is hardly a description of a criminal statute meeting the due process and notice requirements of the Fifth and Sixth Amendments.

B. *Lack of legislative standards.* Given the normal meaning of language, the statute may present no serious question of standards. It makes a passport necessary for departure and control in the event of war or national emergency. But under the Government's construction, there is no guidance to the President or the Secretary as to when and why travel to particular countries should be prohibited upon pain of criminal sanctions. Indeed, we have seen in the confusing and confused testimony of the Department officials before congressional committees, *supra* at 12, 17, 35,

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[32] *Subcommittee Hearings on Internal Security Act, supra* at 43.

[33] *Id.* at 37, 47.

[34] *Id.* at 47.

[35] *Id.* at 73.

that there is a variety of considerations which leads them to restrict travel to particular areas and a variety of exceptions to those restrictions. Here, as this Court said in *Kent* v. *Dulles, supra* at 129, the regulation of travel must be based upon standards "adequate to pass scrutiny by the accepted tests."

The very language of Section 215 indicates that its extension to area restrictions is as lacking in congressional guidance as was its extension in *Kent* v. *Dulles, supra,* to political restrictions. The absence of standards here has also been recognized by the Department itself and by the legislation which it and others have proposed for the purpose of authorizing area restrictions. In the recent hearings, Senator Edward Kennedy pointed out to Mr. Philip B. Heymann, the Acting Administrator of the Bureau of security and Consular Affairs, that "a large and undefined law-making power in this area has been assumed by the Department of State."[36] This commendably candid response was made by Mr. Heymann:

> "As you know, the Secretary's authority to restrict travel has until now been exercised without any legislatively enacted standards and required procedures. One of the important purposes of the proposed State Department bill is to provide Congressional standards for the restriction of travel . . ."[37]

The absence of standards is highlighted by the fact that it is not the President, but administrative officials in the Department of State who impose this serious restriction on travel which is now sought to be enforced criminally. The statutory mandate that the Secretary "shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President", 5 U.S.C. § 156, must

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[36] *Subcommittee Hearings on Internal Security Act, supra* at 54.

[37] *Id.* at 55.

be read in context. That statute gives administrative authority to the Secretary; it does not authorize him to make determinations of policy, without any legislative guidance, determinative of the criminality of American citizens. As the Court said in *Greene* v. *McElroy*, 360 U. S. 474, 496:

> "* * * the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power * * *."

This is in sharp contrast to the proposals made by both Senator Eastland and the Department of State. Under Senator Eastland's bill, the determination of the Secretary of State is expressly made "subject to the approval of the President" and the Secretary's regulations must be based upon findings of fact published by the Secretary "which provide the basis for such determinations, and to authorize, when necessary, such restrictions as the national interest, the protection of national security and the full, effective, and successful conduct of foreign affairs may require . . ." S. 3243, 89th Cong., 2d Sess.[38] H.R. 14895, the Department's bill, requires that the Secretary's actions be subject to the approval of the President.[39]

The interpretation of Section 215 by the court below avoids the constitutional problems just discussed. But the Government's new interpretation, made for this case, not only writes a new statute but leaves an administrator with no guidance as to its enforcement. Such an interpretation conflicts so violently with its language and its history before and after passage that it makes the statute constitutionally deficient by reason both of vagueness and lack of legislative standards.

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[38] *Id.* at 3.

[39] *Id.* at 82.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Appellees.

October, 1966.

APPENDIX

Statutes, Proclamations, Executive Orders and Regulations

A. Border Control

1. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. § 1185 provides, in pertinent part, as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President, or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, *tackle, apparel and furniture, concerned in any such* violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeiture, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

2. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the

freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

3. The pertinent portions of the Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United

States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 52.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regula-

tions as he may find the interests of the United States to require.

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5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

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4. The pertinent portions of the regulations issued by the Secretary of State as found in Part 53 of Title 22 of the Code of Federal Regulations are:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

American Citizens and Nationals

§ 53.1 Definition of the term "United States". The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 Limitations upon travel. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 Exceptions to regulations in § 53.2. No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central or South America or any island adjacent thereto: And provided also, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: Provided, That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

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(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

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§ 53.5 Prevention of departure from or entry into the United States. • • •

§ 53.6 Attempt of a citizen or national to enter without a valid passport. • • •

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§ 53.8 Discretional exercise of authority in passport matters. Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

3. Public Notice 179, 26 F.R. 492, promulgated on January 16, 1961 provides:

Department of State

[Public Notice 179]

United States Citizens
Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

Loy Henderson
Deputy Under Secretary for
Administration

4. Press Release No. 24 issued by the Secretary of State on January 16, 1961, provides:

Press Release No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

B. Area Restrictions

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U.S.C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F.R. 799, as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 Refusal to issue passport. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 Violation of passport restrictions. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 Secretary of State authorized to make passport regulations. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

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